

**CONRAIL**



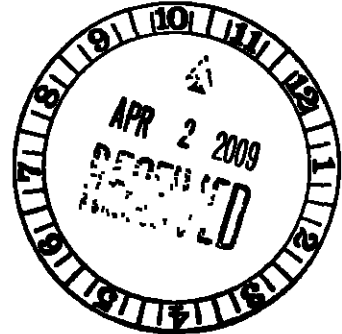
**JOHN K. ENRIGHT, Associate General Counsel**

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April 1, 2009

*Via UPS overnight mail*

Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E State Street, SW  
Washington, DC 20024



Re: Docket No AB 167 (Sub No 1190X) 224811  
Consolidated Rail Corporation  
Lehigh Valley Main Line  
Abandonment Exemption in Hudson County

Dear Secretary Quinlan

Enclosed please find an original and ten copies of Consolidated Rail Corporation's Motion to Dismiss the Notice of Intent to File an Offer of Financial Assistance filed by CNJ Rail Corporation on December 19, 2008

Please time stamp the enclosed extra copy of this letter and return it to me in the enclosed self-addressed, stamped envelope

Sincerely,

  
John K. Enright

ENTERED  
Office of Proceedings

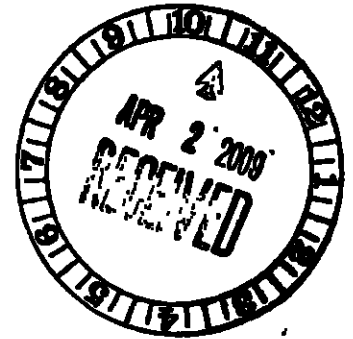
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Public Record

cc Eric Strohmeier, V P of CNJ Rail Corporation  
Joseph H. Dettmar, Esq. Deputy Director, Office of Proceedings

BEFORE THE  
SURFACE TRANSPORTATION BOARD

224811  
STB NO. AB 167 (SUB-NO. 1190X)



CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN  
HUDSON COUNTY, NEW JERSEY

~~STB NO. AB 55 (SUB-NO. 690X)~~

CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON  
COUNTY, NEW JERSEY

~~STB NO. AB 290 (SUB-NO. 313X)~~

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE  
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

NOTICES OF EXEMPTION

MOTION TO DISMISS NOTICE OF INTENT  
TO FILE AN OFFER OF FINANCIAL ASSISTANCE

ENTERED  
Office of Proceedings

APR - 2 2009

Part of  
Public Record

Introduction

Consolidated Rail Corporation (“Conrail”) hereby requests the Board to reject the Notice of Intent to File an Offer of Financial Assistance filed by CNJ Rail Corporation (“CNJ OFA Notice”) filed on December 19, 2008 on the grounds that 1) the deadline for filing an OFA has now past, 2) CNJ does not have the requisite financial responsibility to file an OFA and 3) there is no realistic likelihood of rail traffic over the line to be abandoned. See, e.g., *Union Pacific Railroad Co —Abandonment and Discontinuance of Trackage Rights Exemption—In Los*

*Angeles County, CA*. STB Docket No AB-33 (Sub-265X), 2008 WL 1968728 (STB served May 7, 2008) ("*Los Angeles County*")

### **Background**

On December 19, 2008, along with various discovery requests, CNJ filed a Notice of Intent to File an OFA, a Notice of Intent to Participate as a Party of Record and a Request to Toll the Time Period for Filing an OFA in the subject proceeding. Conrail responded to the discovery requests on December 31, 2008, explaining that only a small segment of the Line remained under Conrail ownership (the "Conrail Segment") and that Conrail was obligated to sell the Conrail Segment to third parties as a result of a court approved settlement. On January 22, 2009, Conrail supplemented its response by providing CNJ with a Minimum Purchase Price for the Conrail Segment. Conrail even accommodated CNJ by meeting Eric Strohmeier on site to show him the Conrail Segment and also to emphasize that it did not connect to any active rail line.

On February 5, 2009, Conrail wrote to the Board indicating that it had fully complied with its discovery obligations to CNJ and that the ten day deadline for submitting an OFA had passed. Accordingly, Conrail requested the Board to issue a Decision approving the Notice of Exemption effective as of February 12, 2009. On February 9, 2009, CNJ filed a letter with the Board claiming that Conrail needed to provide the Minimum Purchase Price for the entirety of the Line, not just the Conrail Segment. CNJ further advised the Board that it would be filing a motion to compel discovery sometime the week of February 15, 2009 and therefore, requested the Board not to take any action until it filed said motion. On February 11, 2009, Conrail responded by noting to the Board that the Minimum Purchase Price information sought by CNJ related to property that Conrail neither owned nor controlled and therefore, was not appropriate discovery.

### **Argument**

OFA regulations – including the deadlines set forth in those regulations – are to be strictly construed. See e.g. *Chelsea Property Owners -- Abandonment – Portion of the Consolidated Rail Corporation 's W' 30<sup>th</sup> Street Secondary Track in New York, NY – in the Matter of an Offer of Financial Assistance* Docket No. AB-167 (Sub-No. 1094) 1993 WL 274727 \* 3 (served July 22, 1993) (OFA deadlines “designed to ensure that railroads would be able to dispose of their property expeditiously and by a date certain”) Moreover, the Board does not permit parties to abuse the OFA process. See *Norfolk Southern Ry. Co. —Abandonment Exemption—in Norfolk and Virginia Beach, VA*, STB Docket No. AB-290 (Sub No. 293X), 2007 WL 3277033, at \*7 (served Nov. 6, 2007).

The deadline for filing an OFA was February 1, 2009, ten days after discovery was complete. 49 CFR 1152.27 (2).<sup>1</sup> CNJ has sought to extend that deadline on the pretext that Conrail's disclosures were incomplete. In so doing, CNJ stated that it would be filing a motion to compel discovery during the week of February 15, 2009. More than six weeks have passed since the week of February 15th, however, and CNJ has yet to file either such a motion or an OFA. CNJ cannot toll the deadline for filing an OFA indefinitely through inaction. If CNJ actually believed that Conrail failed to comply with discovery obligations, as CNJ alleged – and which Conrail vigorously disputes – then CNJ should have filed the motion to compel that it stated it would file in its February 9, 2009 letter to the Board. Having failed to do so, CNJ should not be permitted to abuse the OFA process and benefit from its delay and inaction, especially when such delay serves no legitimate purpose and otherwise simply protracts the

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<sup>1</sup> Conrail in its letter dated February 5, 2009, mistakenly identified the deadline as February 5, 2009.

abandonment process, wasting the resources of both the Board and Conrail See *Chelsea Property, supra* Accordingly, CNJ's OFA Notice should be rejected as untimely <sup>2</sup>

Moreover, even if CNJ had timely filed an OFA, it would have to be rejected on its merits For one thing, CNJ has no credible interest in reviving freight rail service on the Lehigh Valley Main since it owns no rail assets and conducts no rail operations *Maryland Transit Admin —Pet for Dec Order*, STB Fin Dkt No 34975, 2008 WL 428198, \*1 n 3 (served Sept 19, 2008) (“MTA”) For the same reason, CNJ simply cannot demonstrate that it has the “financial responsibility” required to sustain an OFA request See 49 C F R § 1152.27(c)(1)(B).<sup>3</sup>

Even if CNJ had a genuine interest in reviving freight rail service on the line – and the financial ability to do so – an OFA would be baseless because there are no shippers, and there have been none for over a decade Even in the cases like *King County* and *Roaring Fork* where the Board has found that there was insufficient evidence of firm shipper commitments to conclude that a freight rail operation could be viable, there was *some* indication from actual shippers in the vicinity that they were actually interested in freight service *King County*, 3 S T B at 634, 641-42, 1998 WL 452837, \*1, 5-6, *Roaring Fork*, 4 S T B. at 120, 1999 WL 323347, at \*3 Here, there is no recent rail activity, there are no shippers in the area, and there is no evidence that there will be shippers in the area Further, providing freight rail service over

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<sup>2</sup> Even if CNJ had timely filed a motion to compel, such a motion would be utterly without merit CNJ indicated that it would ask the Board to compel Conrail to produce information regarding the Minimum Purchase Price for property that is no longer owned by Conrail Such a request is absurd and improper on its face

<sup>3</sup> In addition, as Conrail has shown in a submission filed today in another proceeding, CNJ is not an operating company and, according to a report from the New Jersey State Business Gateway Service, has been “DISSOLVED WITHOUT ASSETS ” Conrail's Reply to Notices of Intent to File An Offer of Financial Assistance at 8 (filed in STB No AB 167 (Sub-No 1189X, *Consolidated Rail Corporation - Abandonment Exemption – In Hudson County, New Jersey*) (quoting report)

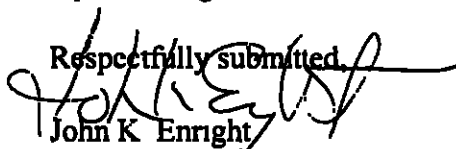
the right-of-way would be a physical impossibility since it is stranded right of way, unconnected to any active rail service

Lastly, the Conrail Segment is to be sold shortly to third parties as part of a court approved settlement in a Superior Court of New Jersey, Law Division, Hudson County, action entitled *Liberty Storage LLC v Metro Realty Corp and GXR Auto Body Corp v Consolidated Rail Corporation et al (Docket NO L-3309-005)* Accordingly, Conrail would not be able to convey its interest in the Conrail Segment without being in violation of said court approved settlement Therefore, even if the Conrail Segment were suitable for restoring rail service, it is not freely alienable under the OFA process

#### **Conclusion**

The purpose of an OFA proceeding is to continue freight rail service over a line The Lehigh Valley Main Line has been out of service for many years and is no longer connected to active railroad right-of-way CNJ has neither the intention nor the financial capacity to provide freight rail service on the Lehigh Valley Main Line Moreover, even if CNJ did have the requisite intent and ability, there are no shippers on the line and no infrastructure to support freight service Accordingly, the Board should dismiss the CNJ's OFA Notice as well as its Notice to Participate as a Party and request to toll this proceeding

Respectfully submitted,



John K. Enright

Associate General Counsel

CONSOLIDATED RAIL CORPORATION

1717 Arch Street, 32nd Floor

Philadelphia, PA 19103

(215) 209-5012

Dated April 1, 2009

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of April, 2009, a copy of the foregoing Motion to Dismiss the Notice of Intent to File an Offer of Financial Assistance was served by UPS overnight delivery to Eric S. Strohmeier, Vice President, COO of CNJ Rail Corporation, 81 Century Lane, Watchung, NJ 07069

A handwritten signature in black ink, appearing to read "John K. Enright", is written over a horizontal line.

John K. Enright  
Associate General Counsel  
Consolidated Rail Corporation